UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Tony R. Warren, Jr.,	)	Case No. 03-11434C-7G
	)	
Debtor.	)	

ORDER

This case came before the court on January 6, 2004, for hearing upon a motion to dismiss case filed by the United States Bankruptcy Administrator. Robyn C. Whitman appeared on behalf of the Bankruptcy Administrator and J. Gordon Boyett appeared on behalf of the Debtor.

The motion seeks dismissal of this case pursuant to § 707(b) of the Bankruptcy Code. Under § 707(b) "the **court** . . . may dismiss a case filed by an individual debtor under [chapter 71 whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of [chapter 7]." Under this language, it is a prerequisite that the debts in the case be "primarily consumer debts" before dismissal can occur. See In re &@&, 858 F.2d 1051, 1055 (5th Cir. 1988) ("[S]ection 707(b) only applies in a Chapter 7 proceeding in which the debts are 'primarily' consumer debts. Even if the filing of the petition is in fact a substantial abuse, a case **may** not be dismissed under this provision unless this prerequisite is satisfied."). Because the evidence presented at the hearing was insufficient to show that the debts in this case are primarily consumer debts, the court, without reaching the issue of substantial abuse, must deny the motion.

Under § 101(8) of the Bankruptcy Code, a consumer debt is defined as a debt "incurred by an individual primarily for a personal, family, or household purpose. . ." In determining whether debt is for a "personal, family, or household purpose" under § 101(8), courts look to the purpose for which the debt was incurred. See In re Kelly, 841 F.2d 908, 913 (9th Cir. 1988). Debt incurred "for a business venture or with a profit motive does not fall into the category of debt incurred for 'personal, family, or household purposes. ." In re Runski, 102 F.3d 744, 747 (4th Cir. 1996). Applying this test in Runski, the court held that debt incurred by an individual to purchase medical and office equipment for use in the debtor's chiropractic practice was not consumer debt because such debt was incurred with a profit motive, i.e., to earn a living. Id. at 747. In accord In re Kestell, 99 F.3d 146, 149 (4th Cir. 1996); In re Jones, 114 B.R. 917 (Bankr. N.D. Ohio 1990); In re Latimer, 82 B.R. 354 (Bankr. E.D. Pa. 1988); In re Goulding, 79 B.R. 874 (Bankr. W.D. Mo. 1987); In re Frisch, 76 B.R. 801 (Bankr. D. Colo. 1987); In re Restea, 76 B.R. 728 (Bankr. D. S.D. 1987); In re Bell, 65 B.R. 575 (Bankr. E.D. Mich. 1986); In re Almendinser, 56 B.R. 97 (Bankr. N.D. Ohio 1985).

In the present case, the Debtor listed six debts totaling $83,825.37. The only evidence regarding the nature of such debts and whether such debts were business or consumer debts was the testimony of the Debtor. According to his testimony, four of the debts totaling $65,692.00 were business debts involving debts of his

company which were guaranteed by the Debtor, one of the debts in the amount of $13,966.98 was a family debt incurred to purchase a horse trailer for his wife's hobby, and there was one debt in the amount of $4,165,66 about which the Debtor was unsure as to whether it was involved consumer charges or charges related to his company.

The cases are divided concerning the test that should be utilized in determining whether the debt in a chapter 7 case is primarily consumer debt for purposes of § 707(b). Some courts, probably a majority in number, rely upon the ratio of the dollar amount of consumer debt to non-consumer debt and conclude that the consumer debt must be over 50% in order for the debt to be primarily consumer debt. See In re Stewart, 175 F.3d 796 (10th Cir. 1999); In re Booth, 858 F.2d 1051 (5th Cir. 1988); In re Kelly, 841 F.2d 908 (9th Cir. 1988). Other courts rely upon the number of consumer debts compared to number of non-consumer debts and have found that the debt is primarily consumer debt where the number of consumer debts is more than 50% of the total debts. See In re Motaharnia, 215 B.R. 63 (Bankr. C.D. Cal. 1997); In re Higginbotham, 111 B.R. 955 (Bankr. N.D. Okla. 1990). Other courts have concluded that it is appropriate for the court to consider both percentage of consumer debt as well as the number of consumer debts in deciding whether the debt is primarily consumer debt. See In re Bell, 65 B.R. 575 (Bankr. E.D. Mich. 1986): See generally Annotation, What Are "Primarily Consumer Debts" Under 11 U.S.C. § 707(b), 101 A.L.R. Fed. 771 (1991).

The amount of the debts which could be found to constitute consumer debt in this case is only 17%, while the number of such debts also is 17% of the total number of debts. Under any of the foregoing tests, the consumer debt is insufficient to support a finding that the debts in this case are "primarily" consumer debts. It follows that motion to dismiss pursuant to § 707(b) should be denied.

IT IS SO ORDERED.

This 14 day of January, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge